IN THE

Supreme Court of the United States

October Term, 1960

No. 671

HENRY M. STELLE, WILLIAM HAYWOOD
LARKINS, PATRICIA GLOCKA [illegible]
PRISCILLA OWENS [illegible]
CAROLINA NANCE, BARBARA [illegible]
JOHN ANGLISH BROWN, [illegible]
COLLIE CAGNEY,

Petitioners,

v.

CITY OF TALLAHASSEE,

Respondent.

ROBERT K. ARMSTRONG, ROLAND W. [illegible]
DEREK SPENCER LAWLER, [illegible]
JOHN J. ROLAND,

Petitioners,

v.

CITY OF TALLAHASSEE,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

[illegible]

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Petitioners,

v.

CITY OF TALLAHASSEE,

Respondent.

and

ROBERT K. ARMSTRONG, ROLAND W. EVES, DEREK SPENCER LAWLER and JOHN J. POLAND,

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1. **The Jurisdictional Question.** The Supreme Court

of Florida has stated that a common-law writ of certiorari will issue to a Circuit Court, in cases where the Circuit Court has rendered an appellate judgment, only (a) if there is an issue of want of jurisdiction in the lower courts, or (b) if there is an issue of failure of the lower courts to proceed in accordance with the essential requirements of law, i. e., an issue of illegality of procedure. *American Nat. Bank of Jacksonville* v. *Marks Lumber & Hardware Co.*, 45 So. 2d 336 (Fla., 1950). This rule, as thus defined by the Supreme Court of Florida, would preclude Petitioners herein from seeking certiorari either in that Court or in the District Court of Appeal, for Petitioners are not challenging the jurisdiction of the Tallahassee Municipal Court or the Circuit Court, nor do Petitioners aver that the proceedings below were procedurally illegal or irregular.

The cases cited by Respondent in its Brief in Opposition, namely *Hunt* v. *City of Jacksonville*, 34 Fla. 504, 16 So. 398 (1894); *Mernaugh* v. *City of Orlando*, 41 Fla. 433, 27 So. 34 (1899); and *Malone* v. *City of Quincy*, 66 Fla. 52, 62 So. 922 (1933), in no way conflict with the rule announced in *American Nat. Bank of Jacksonville*, *supra*; on the contrary, they very clearly illustrate the application of this rule. Thus, *Hunt* v. *The City of Jacksonville* involved the *procedural* question of trial by jury in cases tried in municipal courts. Similarly, in *Mernaugh* v. *City of Orlando* and *Malone* v. *City of Quincy* the issue presented was that certain municipal ordinances were void and that the judgments of the inferior courts were therefore void for *want of jurisdiction*.

The Supreme Court of Florida long ago announced that its certiorari jurisdiction over appellate judgments of

Circuit Courts is a supervisory power and not a general appellate jurisdiction, for otherwise the provisions of the Florida constitution vesting final appellate jurisdiction in the Circuit Courts in such cases would be meaningless. *Benton* v. *State*, 74 Fla. 30, 76 So. 341 (1917). The Supreme Court of Florida has reiterated this rule on numerous occasions: *Des Rocher & Watkins Towing Co.* v. *Third Nat. Bank of Miami*, 143 So. 768 (1932); *Morris* v. *State*, 148 So. 182 (1933); *Nation* v. *State*, 22 So. 2d 219 (1945); and the District Courts of Appeal abide by the same rule: *Townsend* v. *State*, 97 So. 2d 712 (1957); *State* v. *Katz*, 108 So. 2d 60 (1959).

Petitioners submit, therefore, that in the circumstances of this case, the judgments of the Circuit Court below are final judgments "rendered by the highest court of a State in which a decision could be had", within the meaning of 28 U.S.C. §1257.

Petitioners in *Steele* would also explain to the Court that in that case they originally filed their Notice of Appeal from the judgments of the Municipal Court for Tallahassee to the Supreme Court of Florida on the assumption that such direct appeal would lie pursuant to Article 5, §4 (2) of the Florida Constitution, which provides, in pertinent part, that: "Appeals from trial courts may be taken directly to the supreme court, as a matter of right . . . from final judgments . . . construing a controlling provision of the Florida or federal constitution". The Florida Supreme Court on May 16, 1960 ruled that a direct appeal did not lie in this case and transferred the cause to the Circuit Court. (See transcript of record-on-appeal). However, the question of review by *appeal* by the Florida Supreme Court of the judgment of the *trial* court was an

issue separate and distinct from that of review by the *common-law writ of certiorari* of the judgment of a Circuit Court sitting as an *appellate* court, and the latter point was in no way involved in the Florida Supreme Court's transfer order.

2. **The Issue of Racial Discrimination.** Respondent's argument that this Court will not "review evidence" on certiorari proceedings is not well taken. In *Norris* v. *Alabama*, 294 U. S. 587; 55 S.Ct. 579; 79 L.Ed. 1074 (1935), which involved the question of systematic exclusion of Negroes from jury service, this Court specifically stated in that certiorari proceeding that:

> "whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured." 79 L.Ed. 1074, 1077.

Since Respondent asserts that no racial discrimination was practiced upon Petitioners, and since Petitioners assert that the evidence disclosed the contrary, Petitioners submit that it is incumbent upon the Court to analyze the facts as it did in *Norris* v. *Alabama*, *supra*.

Petitioners submit that Respondent's argument—that Petitioners' arrest and conviction can be justified simply on the alleged ground of preventing a riot—is thoroughly specious, and insupportable under the Federal Constitution. In both *Steele* and *Armstrong* it is clear (1) that Woolworth's practiced racial discrimination at their lunch counter; (2) that Petitioners' conduct at the counter was

at all times peaceful in itself; and (3) that any expressions of hostility or threats of violence came from the bystanders and those persons who made the anonymous telephone calls, not from Petitioners and not from Woolworth's employees. In these circumstances, by arresting Petitioners and not arresting the offending third persons who made the alleged threats because they resented the presence of Negroes at the lunch counter, the Mayor and the police committed a gross act of racial discrimination. Petitioners submit that such discrimination is prohibited by and in conflict with this Court's long-standing rule announced in *Yick Wo* v. *Hopkins*, 118 U.S. 356; 6 S.Ct. 1064; 30 L.Ed. 220 (1886).

Moreover, if, as Respondent urges, the judgments below are bottomed on the theory that these arrests were made in order to prevent a riot, then Petitioners submit that these judgments are in direct conflict with the ruling of the Court of Appeals for the Eighth Circuit in *Sellers* v. *Johnson*, 163 F. 2d 877 (1947). There, a group of Jehovah's Witnesses had been denied the right to hold religious assemblies because on previous occasions, due to their unpopularity among certain local elements, mob violence had erupted. However, the Court of Appeals stated that:

> "Certainly the fundamental rights to assemble, to speak, and to worship cannot be abridged merely because persons threaten to stage a riot or because peace officers believe or are afraid that breaches of the peace will occur if the rights are exercised." 163 F.2d 877, 881.

Similarly, Respondent's position runs afoul of this Court's recent pronouncement in the Little Rock school

case of *Cooper* v. *Aaron*, 358 U.S. 1; 78 S.Ct. 1401; 3 L.Ed. 2d 5 (1958), where, notwithstanding community hostility toward the Negro students, this Court refused to suspend the federal desegregation order. This Court stated that "law and order are not here to be preserved by depriving the Negro children of their Constitutional rights." 3 L.Ed. 2d 5, 16.

Petitioners submit that the foregoing quotation succinctly states the nature of their plea to this Honorable Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioners' Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari has, pursuant to Rule 33 (1) of the Revised Rules of The Supreme Court of the United States, been served by air mail upon James Messer, Jr., Counsel for Respondent, P. O. Box 878, Tallahassee, Florida, this_____day of_____, 1961.

ALFRED I. HOPKINS